IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

KEITH FAIR,	:	
	:	
PETITIONER	:	HABEAS CORPUS
	:	FILE NO. 5100
VS.	:	
	:	
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Hall County. Petitioner pled guilty to murder. After a presentencing trial on the issue of punishment, the trial judge found the existence of two statutory aggravating circumstances and sentenced Petitioner to death. Petitioner's plea of guilty and death sentence were affirmed by the Supreme Court. Fair v. State, 245 Ga. 868 (1980). Upon reconsideration in light of Godfrey,[1] the Supreme Court reaffirmed Petitioner's death sentence. Fair v. State, 245 Ga. at 879 (Addendum). Certiorari was denied by the Supreme Court of the United States.

The Petition contains 18 numbered paragraphs, of which 9 allege substantive claims for relief (9-17).

[1] Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The Court will rule on these claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition.

The record in this case consists of the transcript of the proceedings before this Court on July 15, 1981; the deposition of Roland Stroberg; and the transcript and record of Petitioner's trial in the Hall County Superior Court.

9.

In paragraph 9, Petitioner contends he was denied effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments and the Georgia Constitution. Specifically, Petitioner claims his trial counsel were ineffective in advising him to plead guilty, that he could withdraw his guilty plea if a death sentence were imposed and be tried by a jury; and that counsel were not adequately prepared to meet the evidence of the Habersham County incident.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by George Brinson and Michael Casper. Mr. Brinson was appointed to represent Petitioner on the Hall County charges. (H.T. 9). After he requested assistance, Mr. Casper was appointed as co-counsel. (H.T. 10).

Mr. Brinson testified that after his initial conference with Petitioner, both attorneys met with Petitioner at least 6 or 7 times, with each conference lasting at minimum an hour. (H.T. 9, 19). At these

conferences they discussed with Petitioner the results of their investigation and told him the State had an almost iron-clad case against him. (H.T. 19). Counsel had gotten the list of State's witnesses, approximately 30 or 40 people, and had talked to as many witnesses as they could locate. (H.T. 9-10). The prosecutor and his assistant were very cooperative in advising Counsel of the evidence against Petitioner. (H.T. 21). Counsel attempted pretrial negotiations, but the State refused. (H.T. 10). Counsel determined no defenses were available. (H.T. 64). They also consulted with other attorneys who agreed that Petitioner had a better chance to get a life sentence before a judge. (H.T. 19). Finally, based upon their extensive legal research, they concluded under Ga. Code Ann. §27-1404, that Petitioner had the absolute right to withdraw his guilty plea after sentence was pronounced but before it was filed with the clerk. (H.T. 23, 69). They prepared a contingency plan for withdrawing Petitioner's plea (H.T. 12-15, 66-69). Counsel had discussed with Petitioner the pros and cons of each method of trial, and Petitioner agreed to waive a jury trial and rely on the contingency plan. (H.T. 22-23, 53, 63, 66). When the trial judge imposed a death sentence, Counsel attempted to withdraw Petitioner's plea, but the trial judge refused to allow withdrawal. (H.T. 12-15, 66-69).

As to the Habersham County charge of murder, Counsel filed a Motion in Limine to exclude

any evidence connected with the Habersham incident. (R. 72-74). The Motion was denied. (H.T. 71). All Habersham evidence was admitted over objection. (T.T. 78).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meet this test. They were experienced in the trial of criminal cases. They prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort they put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel were ineffective in advising him he could withdraw his guilty plea in the event of a death sentence being imposed and then be tried by a jury.

The Court finds the contingency plan for withdrawing Petitioner's guilty plea to be a strategy. Strategic and tactical decisions are the exclusive province of a lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975).

Counsel found themselves in an impossible situation. Petitioner had admitted his guilt. (H.T. 20). Counsel

had determined that no defenses were available. The contingency plan for withdrawing Petitioner's plea of guilty was based upon the law as it existed at the time. The fact that the Supreme Court decided on direct appeal that Ga. Code Ann. § 27-1404 does not apply to the capital sentencing procedure does not mean that Counsel was ineffective in giving advice based on the law as it existed at the time. In fact, the Court of Appeals has recognized there is no duty on counsel to anticipate this type change in the law. Gray v. State, 157 Ga. App. 745, 746 (1981).

That the advice given Petitioner turned out to be bad does not make the giver of that advice ineffective within the meaning of the Sixth Amendment. Petitioner's situation was such that any plan adopted by Counsel involved risks. The fact that the plan did not work does not mean that Counsel were ineffective.

Petitioner has also suggested Counsel were ineffective in failing to meet the Habersham County murder evidence. Counsel filed a Motion in Limine to exclude any such evidence. They objected to its admission. They had talked to all the witnesses they could locate. (H.T. 29, 74). Counsel did all they could do short of trying the Habersham case. Petitioner has not shown how any lawyer could have met the evidence.

Accordingly, the claim for relief in paragraph 9 is found to be without merit.

10.

In paragraph 10, Petitioner claims he was denied due process of law in violation of his Fifth and Fourteenth Amendment rights by the trial court's denial of his right to withdraw his plea of guilty.

The Supreme Court has already concluded that Ga. Code Ann. §27-1404 relating to withdrawal of guilty pleas as a matter of right does not apply to guilty pleas tendered in capital cases. Fair v. State, 245 Ga. at 878.

Accordingly, this allegation is found to be without merit.

11.

See paragraph 10.

12.

In paragraph 12, Petitioner contends his guilty plea was involuntarily made, in violation of his constitutional rights, because the plea was based on his trial counsel's assurance that the plea could be withdrawn as a matter of right.

FINDINGS OF FACT

Prior to accepting Petitioner's plea of guilty, the trial court "exhaustively examined the appellant to determine if the plea was voluntarily and intelligently given"; informed Petitioner and his counsel that the Court was not conscientiously imposed to capital punishment and would impose a death sentence if the facts warranted

it; recessed to allow Petitioner to confer again with his counsel; and thereafter accepted Petitioner's plea of guilty. Fair v. State, 245 Ga. at 875; T.T. 5-19.

CONCLUSIONS OF LAW

The Court has already concluded Counsel's advice on the issue of withdrawal of a plea was based on the law as it existed at that time. (See paragraph 9). A voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747, 761 (1970).

Here, Petitioner was aware of his rights and knew there was a chance he could receive a death sentence. (H.T. 21-22, 58, 66, 69). The plan to withdraw Petitioner's plea of guilty was a risk which Petitioner apparently was willing to take. Because he does not like the result is not sufficient reason to invalidate his plea.

Accordingly, this claim for relief is found to be without merit.

13.

In paragraph 13, Petitioner claims the novel construction of Ga. Code Ann. §27-1404 by the Supreme deprived him of due process of law.

The decision of the Supreme Court as to whether or to what extent Ga. Code §27-1404 applied to Georgia's

death penalty statute was a question of first impression. Fair v. State, 245 Ga. at 876. The Court concluded that a guilty plea may not be withdrawn as a matter of right in a capital case other than treason or aircraft hijacking. Fair v. State, 245 Ga. at 878.

The Supreme Court left intact the line of procedural decisions of the Court of Appeals on the right to withdraw a guilty plea without approving or disproving them. Fair v. State, 245 Ga. at 878, fn. 5. The reversal of which Petitioner complains [the line of procedural decisions under §27-1404] occurred in a subsequent decision, State v. Germany, 246 Ga. 455 (1980), and is irrelevant to Petitioner's case.

Accordingly, this claim for relief is found to be without merit.

14.

The issue raised in paragraph 14 has already been decided adversely to Petitioner on direct appeal. Fair v. State, 245 Ga. at 871.

15.

The issue raised in paragraph 15 has already been decided adversely to Petitioner. Fair v. State, 245 Ga. at 879 (Addendum).

16.

In paragraph 16, Petitioner claims violation of his constitutional rights by the admission of the

testimony of Michael Marable, testimony alleged to be given in exchange for an undisclosed promise of leniency.

FINDINGS OF FACT

At Petitioner's sentencing trial, Michael Marable testified that he had not been promised anything in return for his testimony. (T.T. 366). At the habeas hearing, Mr. Marable initially stated that he based his testimony on some promises by the prosecutor (H.T. 44), then later stated that the prosecutor had made no promises but had told Mr. Marable he would write a recommendation to the judge in Forsyth County concerning the pending charges against Mr. Marable. (H.T. 51).

Roland Stroberg, the prosecutor in this case, denied making any promises or statements to Mr. Marable. (Stroberg Depo., 7-8). Mr. Stroberg told Mr. Marable that it "took a lot of guts to testify" and that he would let the Forsyth County Judge know Mr. Marable had testified. (Stroberg Depo., 11).

CONCLUSIONS OF LAW

Petitioner has made no showing of any undisclosed promise of leniency. Further, the Court cannot assume an agreement existed merely because of the subsequent disposition of criminal charges against a witness for the State. Fleming v. State, 236 Ga. 434, 438 (1976).

Accordingly, the allegation in paragraph 16 is found to be without merit.

17.

The issue in paragraph 17 has already been decided adversely to Petitioner. Fair v. State, 245 Ga. at 869 (2).

WHEREFORE, all allegations in the Petition having been found to be without merit, the Petition is denied.

This 20 day of October, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

KEITH FAIR,

Petitioner

vs

WALTER D ZANT, Warden
Georgia Diagnostic and
Classification Center,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, KEITH FAIR, who is now held in the Georgia Diagnostic and Classification Center, Jackson, Georgia, asks leave to file the Attached Petition for Writ of Certiorari to the Superior Court of Butts County, Georgia, without prepayment of costs and to proceed in forma pauperis.

Affidavit of Petitioner's counsel in support of this motion is attached hereto.

Bruce S. Harvey

Bruce S. Harvey

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Suite 203
Atlanta, Georgia 30305
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IN THE

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OCTOBER TERM 1981

No. 81

KEITH FAIR,

Petitioner

vs

STATE OF GEORGIA,

Respondent

PAUPER'S AFFIDAVIT

Personally appeard before the undersigned officer duly authorized to administer oaths BRUCE S. HARVEY; who, on being sworn, deposes and says that he is presently counsel for Petitioner in the above-styled Petition of Writ of Certiorari and makes this Affidavit for use in filing same and that the facts contained herein are based upon his personal knowledge acquired while serving as counsel for Petitioner.

-1-

I am counsel for Petitioner in his Petition for Writ of Certiorari to the Superior Court of Butts County, Georgia.

-2-

Petitioner is currently incarcerated in death row in the Georgia Diagnostic and Classification Center, Jackson, Georgia.

-3-

Counsel was appointed to represent Petitioner in Habersham County, Georgia, on or about August 7, 1979. Since that time Petitioner has proceeded in forma pauperis to the Supreme Court of Georgia, to this Court, and in the Superior Court of Butts County, Georgia.

-4-

Petitioner is not curretnly employed; has had no income whatsoever in the past twelve months; and owns no checking or savings accounts, stocks, bonds, automobiles, or other valuable property:

WHEREFORE, Affiant prays that Petitioner have leave to proceed in this Court on Petition for Certiorari in forma pauperis.

Bruce S. Harvey

Bruce S. Harvey

Sworn and subscribed to before me this 5 day of March, 1982.

Notary Public

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